IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.630 OF 2006
IN
COMPANY APPLICATION NO.470 OF 2002
IN
COMPANY PETITION NO.416 OF 1997

1. DCM Daewoo Motors Ltd. a public limited company having its office at Office at Kanchan Junga, 1st floor, New Delhi - 110 098. ..Petitioner.

AND

2. Commissioner of Central Excise, Mumbai III (now Thane III), Navprabhat Chambers, Ranade Road. Dadar (West), Mumbai - 400 028. ..Applicant.

V/s.

1. The Official Liquidator, High Court, Bombay (Provisional Liquidator of Atash Industries India Ltd.) having office at Bank of India Building, 5th floor, Fort, Bombay.

2. Centurion Bank Ltd. (now Known) as Centurion Bank of Punjab Ltd.) Modern Centre, 'C' Wing, Ground floor, Sane Guruji Marg, Mahalaxmi, Mumbai - 400 011 ..Respondents.

Mr.R.C. Master i/b. T.C. Kaushik for applicant.

Mr.S.Purohit i/b. Wadia Ghandy & Co. for respondent.

Mrs.K.V.Gautam, Dy.O.L.

CORAM : DR.D.Y.CHANDRACHUD, J.

DATED : 29TH MARCH, 2007.

ORAL JUDGMENT

The reliefs that have been sought in the company application are as follows:-

(a) That the order of this Hon'ble Court passed in Company Application No.470 of 2002 dated 29th September, 2003 be modified and the Respondent No.2 be restrained from taking possession of any machinery or capital goods from the bonded warehouse of the Company in view of the said goods having been confiscated by the Applicant by his order dated 16/1/2002;

(b) That the Official Liquidator (Respondent No.1 herein) be directed to hand over possession forthwith of the capital goods in the said Company's bonded warehouse;

(c) That the Centurion Bank (Respondent No.2) be directed not to sell or dispose of any of the goods which it has taken possession of from the Respondent No.1 pursuant to the order dated 29th September, 2003 and to hand over the same to the Applicant;

(d) That the Centurion Bank (Respondent No.2) be declared liable to make good the value of the confiscated goods if the same have been sold or disposed of by the Respondent No.2 pending disposal of this Judge's Summons.

2. The learned counsel appearing on behalf of the applicant, the Commissioner of Central Excise, Mumbai III, states that the goods having already been taken possession of by the second respondent Bank, prayer clauses (a), (b) & (c) of the application do not survive. Consequently, prayer clause (d) alone has been pressed.

3. In the affidavit in support of the Company Application, it has been averred that Atash Industries India Ltd. was a 100% export oriented unit and had availed of facilities under a scheme framed for such units. The Company was granted approval for setting up

a unit on 22nd October, 1992 and on the strength thereof had availed of certain concessions under Customs and Excise notifications for the purpose of importing capital goods and raw materials and to procure indigenous capital goods and raw materials. As against an export obligation of Rs.266.33 crores in five years, the factory only exported goods worth Rs.6.73 crores in the first four years and nothing at all in the fifth year. A notice to show cause was issued to the Company and its Managing Director on 22nd June, 2001 and on 31st December, 2001 an order was passed confiscating the capital goods of the Company valued at Rs.20.36 crores subject to a redemption option of Rs.5 crores. An order of confiscation was also passed against the indigenously procured capital goods valued at about Rs.39.43 lakhs with an option to redeem the same on payment of a fine of Rs.10 lakhs. The applicant has, therefore, averred that on 16th January, 2002 the title to the goods vested with the Union of India being the date on which the order was issued. The Deputy Commissioner by a letter dated 25th June, 2001 has lodged a claim with the Official Liquidator and an affidavit by way of proof of debt dated 30th May, 2002 has also been filed.

4. On 29th September, 2003 an order was passed by the Company Judge permitting the second respondent

which is the Centurion Bank Ltd. to remove certain goods, which according to the Bank, belonged to it subject to the payment of security charges. In the Company Application, it has been pointed out that before the order of this Court was passed, the title to the goods had vested with the Union of India on 16th January, 2002. Hence it has been urged that the order permitting the Bank to take possession of the goods could not have been passed.

5. An affidavit in reply has been filed by the Bank in this proceeding.

6. Some of the facts which have emerged from the affidavit in reply and which have not been controverted are thus:-

7. On 24th February, 1994 a hire purchase agreement was entered into between the Company (Atash Industries India Ltd.) and the Bank. Clause (7) of the hire purchase agreement stipulated that save as otherwise provided in the agreement, no right, title or interest in the equipment shall pass to the hirer by virtue of the agreement. The schedule to the agreement specified the description of the subject matter of the agreement namely the imported plant and machinery. The agreement laid down other essential conditions,

including hire charges, the valuation of the equipment and the period of hire. The company is stated to have made the last payment under the said hire purchase agreement in May, 1996. The Bank instituted a suit on the Original Side of this Court (Suit No.362 of 1997) for recovery of its debts and on 5th February, 1997 the Court Receiver was appointed as Receiver of the plant and machinery which was the subject matter of the hire purchase agreement. On 22nd September, 1997 a decree was passed by this Court on admission and the Court Receiver who had earlier been appointed during the pendency of the suit was appointed as Receiver in execution with the power to sell the goods in the event of a default. The Company made the payments of the instalments prescribed under the Consent Terms upto 28th February, 1998. Upon default, on 18th October, 1999 the Court Receiver was directed to take forcible possession. An order of winding up was passed against the Company on 15th February, 2000 and the Official Liquidator was appointed as Liquidator in respect of the business and assets of the Company.

8. An order of confiscation was passed in exercise of the powers conferred under the Central Excise Act and Customs Act on 16th January, 2002. Prior to the passing of the order, the plant and machinery was custodia legis since February, 1998 when

the Court Receiver came to be appointed as Receiver. A consent decree was passed on 22nd September, 1997 and upon the default of the Company in payment of its dues, the Court Receiver was empowered to sell the plant and machinery. From a bare reading of the hire purchase agreement, it would be clear that the title to the plant and machinery had not passed to the Company and continued to remain in the second respondent with whom the hire purchase agreement was entered into. Therefore, the application that has been filed by the Commissioner of Central Excise is not sustainable. In respect of the dues that are owed to the Union of India towards the Customs and Central Excise, a claim has already been lodged with the Official Liquidator and the proof of debt has been given. The Official Liquidator will necessarily have to deal with the claim and pass orders thereon. The Union of India would be entitled to the consideration and disbursal of its claim in accordance with the provisions of the Companies Act, 1956. The relief sought in prayer clause (d) directing the Bank to make good the value of the confiscated goods cannot in the circumstances be granted.

9. The Company Application is dismissed with the clarification that the Liquidator shall deal with the claim lodged by the Commissioner in accordance with

law.

(DR.D.Y.CHANDRACHUD, J.)